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IN THE

Supreme Court of the United States

No. 271

OCTOBER TERM, 1966.

UNITED STATES OF AMERICA,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

BRIEF OF RESPONDENT, STATE OF OHIO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT.

This Brief is filed in opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit of the United States of America, whereby the United States petitions this Court to review the decision of the United States Court of Appeals *United States of America* v. *State of Ohio*, decided October 9, 1965, 354 F. 2d 549. It shall be the purpose of this Brief to demonstrate that the decision rendered by the United States Court of Appeals below in this matter is not in conflict with any prior decisions of this Court. As a consequence the Petition is without merit, raises no basis upon which to invoke this Court's jurisdiction, and should be dismissed.

ARGUMENT.

The Petition for Writ of Certiorari (hereinafter called "the Petition") should be dismissed because the decision of the United States Court of Appeals for the Sixth Circuit is not in conflict with prior decisions of this Court, nor will it if allowed to stand have a substantial impact upon the administration of the Agricultural Adjustment Act of 1938, 52 Stat. 31, as amended, 7 U.S.C. 1281, et seq.

It must be made very clear at the outset that the State of Ohio is not contending that the operation of State of Ohio owned farms per se as a function of state government is immune from the regulatory powers and control of the Agricultural Adjustment Act of 1938. The contention is that the so-called wheat marketing excess which was penalized was not production of wheat within the intended, implied or permitted scope of the Agricultural Adjustment Act of 1938.

Petitioner in the courts below has relied heavily upon the case of *Wickard* v. *Filburn*, 317 U.S. 111, as being dispositive of this case. Respondent contends that the holding of the Court of Appeals below is in no way in conflict with *Wickard* v. *Filburn*, *supra*. The facts present in the case at bar are readily distinguishable from the factual situation present in the *Wickard* case, *supra*.

The Supreme Court of the United States summarized the facts in *Wickard* as follows:

> "The appellee for many years past has owned and operated a small farm in Montgomery County, Ohio, maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs. It has been his practice to raise a small acreage of winter wheat, sown in the Fall and harvested in the following July; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to

use some in making flour for home consumption; and to keep the rest for the following seeding. The intended disposition of the crop here has not been expressly stated." 317 U.S. at 114.

Article II, Section 41 of the Constitution of Ohio requires that laws shall be passed providing for the occupation and employment of inmates of certain state institutions; and that no product of the work of such inmates shall be "sold, farmed out, contracted, or given away." Pursuant to the above Constitutional provision, Ohio maintains a program for the care, treatment, custody, and rehabilitation of the mentally ill and State criminal offenders in State institutions. The growing of wheat on State farms is an integral part of the program for individual therapy and rehabilitation. All of the wheat produced on the State farms prior to 1954 and since then has been used and consumed by State institutions. Also, no part of the wheat produced, the livestock to which it was fed, or the bakery products in which it was used, was marketed or sold or moved in interstate or foreign commerce.

The Agricultural Adjustment Act of 1938 was enacted by Congress as a means to eliminate abnormal surplus or deficiency of wheat and other commodities on the country-wide market which would directly affect interstate and foreign commerce by depressing prices and disrupting the orderly marketing of such commodities.[1] The law provides for the establishment of a "farm marketing quota" and the assessment of penalties for excessive acreage.[2] The terms "interstate and foreign commerce"[3] and "market"[4] as defined in this Act clearly indicate that the act is concerned

[1] 7 U. S. C. 1331.
[2] 7 U. S. C. 1335 (a) and 1340 (1).
[3] 7 U. S. C. 1301 (a) (3).
[4] 7 U. S. C. 1301 (b) (6) (A).

with the disposal or intended disposal of a named commodity by sale, barter or exchange directly or indirectly to points within or without the state. "Affect interstate and foreign commerce"[5] means to burden or obstruct the free and orderly flow of such commodity or to create or tend to create a surplus which burdens the flow of the commodity in interstate commerce.

In applying this law to the operation of the State of Ohio farms, the Petitioner, as pointed out above, relies heavily on the *Wickard* case, *supra*. In the *Wickard* case, *supra*, the government contended that the acreage quota applied to all wheat whether marketed or retained for home consumption. The argument presented was that the beneficial purpose of the statute could be best achieved if the quota system applied to all wheat available for marketing and not merely that which was actually sold, because of the relationship of all available wheat to market price.[6] The court applied this thinking and ruled as follows:

> "One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat could have a substantial influence on price and market condition. This may arise because being in a marketable condition such wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it in the open market. Home grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon." 317 U.S. at 128.

[5] 7 U. S. C. 1301 (a) (4).
[6] 317 U. S. 118.

It is clear that the basis for regulation in this case was the competitive interdependency which exists between local production and interstate commerce.[7] In the *Wickard* case, *supra*, all wheat produced was considered available for marketing and as an "overhang" of the market such wheat in the aggregate could possibly affect the price and flow of wheat in commerce. Unlike the individual farmer the State of Ohio on no occasion markets wheat and therefore the wheat produced on farms does not "overhang" the market. It is clear that one cannot conclusively determine whether wheat grown on an individual's farm will or will not be channeled into interstate commerce. It is, however, clearly ascertainable that the state, in the operation of its farms in 1954 through 1957, not only did not intend to market any wheat but had no authority to hold wheat available for disposal otherwise than in the operation of its state institutions.[8] In this case then, there exists no possibility of marketing wheat and the finding of impossibility must take the production of wheat by the state out from under the application of the *Wickard* case, *supra*.

The case at bar is further distinguished from *Wickard*, *supra*, in that the Petitioner failed to provide any factual finding of a substantial economic effect upon interstate commerce while the Court in *Wickard*, *supra*, pointed out the need of a "substantial economic effect." Specifically the Court said,

[7] This followed the holdings of *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, and Shreveport Rate Cases, 234 U.S. 342.

[8] Section 41, Article II, Ohio Constitution prohibits the sale or disposal of the products from prison labor, and the theory behind such a prohibition would be equally applicable to disposal of any goods produced in state institutions except to the state and its political subdivisions and its various public institutions.

> "That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. The same consideration might help in determining whether in the absence of congressional action it would be permissible for the state to exert its power on the subject matter, even though in so doing it to some degree affected interstate commerce. But even if appellee's activity be local and though it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" 317 U.S. at 124-5.

As can readily be seen the holding in the Court of Appeals below is distinguishable from the *Wickard* case, *supra*, and *United States* v. *Haley*, 358 U.S. 644, which is a memorandum opinion following *Wickard*, *supra*. Petitioner has not asserted a conflict with any other decisions of this Court and Respondent has not found any that are in conflict.

For all of the foregoing reasons, it is respectfully submitted that the Petition presents no basis upon which to invoke this Court's jurisdiction on certiorari and should be dismissed.

Respectfully submitted,

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